and then asks this court to conclude that the proof of guilt was so overwhelming that the judgment should not be disturbed by reason of the error. The matter is presented as if the point involved were the sufficiency of the evidence.[1]

We submit that in the light of this court's decision in *Kotteakos* v. *United States*, 66 S. Ct. Adv. Op. 1239, such a contention, if made, should be based upon a fair statement of the contents of the record. In the opinion in the foregoing case, written by Mr. Justice Rutledge, it was held that it is not the function of an Appellate Court in determining whether or not error is prejudicial to judge the guilt or innocence of the defendants or predicate its ruling solely on such determination. This does not mean the Appellate Court can escape altogether taking into account the outcome or that the outcome should not be considered, but the real question is not whether the jury was right in its conclusion. The real question is what effect the error had or reasonably might have been taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men—not of one's own. The consideration must be with allowance for how others "might react and not be regarded generally as acting without reason." One must be able to say with fair assurance that the judgment was not swayed by the error.

> "The inquiry cannot be merely whether there is enough to support the result apart from the phase affected by error. It is rather, even so, whether the error had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

We submit that under the foregoing case it is not proper, in presenting the setting in which the error occurred, to take from the record isolated excerpts believed favorable, to combine them, and to put them forward as the evidence

[1] We have not urged this point in our petition for certiorari though we do contend the evidence is insufficient. The point was made before the Circuit Court and it was briefed on the prior hearing in this court. (Brief filed February, 1944) The hearing was limited in scope and the question was not considered.

before the jury when it reached its verdict. Such presentation does not give this court the "entire setting" which it has held to be pertinent to the determination. In view of the Government's contention we feel compelled to burden this court with a more extensive review of the evidence. A statement of the basic concepts of the "I AM" will be found in petitioners' opening brief (Op. Br. p. 8) as well as a general outline of the manner in which the organization was maintained financially. (Op. Br. p. 7) The Government emphasizes the fact that money was received by the defendants for that purpose.

It seems unwilling to recognize that a certain amount of commercialism is necessary in connection with any religion in order to remain active and to promulgate its faith. It is a matter of judicial cognizance that some religious sects become financially wealthy and have become the owners of vast amounts of land and property. No church can maintain itself and carry on its work without having as an integral part of it a financial organization capable of supporting the activities. The right of a religion to collect funds for propagation of its faith has been recognized as an inherent part of the right to freedom of religion. (*Jones* v. *City of Opelika*, 319 U. S. 103.

Notwithstanding the Ballards were the leaders of the Activity there was no direct means employed for their maintenance or with which to carry on the activities connected with the organization. The expenses were not light as the organizers went about holding classes. The Government witness Crouse testified that during each of the years 1937, 1938 and 1939 fourteen classes lasting ten days each were held. (Tr. 562) The staff [redacted] classes numbered twelve or thirteen persons w[redacted] expenses had to be defrayed from love gifts or sale of articles. (R. 584). Between classes the organization had to be similarly maintained. Groups throughout the country having sanctuaries and reading rooms are under no obliga[redacted] whatsoever to contribute anything to the organization. (Tr. 584, 817, 465, 1010, 994, 991)

While the Government claimed in argument that poor people were defrauded, there is nothing in the record to that effect. The Government has selected what it considers the most favorable portions of the record but gives no such reference. The Movement did not do what is common to many church organizations. No collections whatever are taken up at meetings. They are carried on without any solicitation for funds whatsoever. According to Mr. Crouse, the average gift per person at classes was approximately eight cents (R. 584) and he also stated that sometimes the expenses of conducting classes was greater than the amount received. (R. 584) Assuming a member purchased the books and subscribed to "The Voice" his total contribution would compare very favorably with that expected of other denominations. Mrs. Ballard stated that the money received was used in the promulgation of the Activity. (Tr. 1140; 1136) and there is no claim money or property was accumulated by her or by her husband. Mr. Rogers, a Government witness, who managed financial matters for the Ballards for a considerable period, stated it seemed to him the money was used for that purpose. (Tr. 375). Strict instruction was given to group leaders that under no circumstances was money to be asked for. (Exhibit 67, page 13) No fee was to be charged or no collection taken up. (Exhibit 186) The rule was conscientiously adhered to. The following witnesses testified they had attended numerous classes, some over a considerable period of time, and that they had never heard anyone solicit money or anything of value nor urge the purchase of books or other articles: Jane Magnuson (R. 983), Arthur P. Buck, (R. 988), Leona Carter (R. 992), Clare Johns (R. 994), Dewey Hawley (R. 996), Alice Roy (R. 1000), Ruth Lovette (R. 1003), Isabel Gardiner (R. 1007), Irene Hudson (R. 1011).

The Government claims that commercialism pervaded the organization from its inception and quotes a letter to Harry Sieber. Mr. Sieber, after reading "Unveiled Mysteries," came to Chicago to see Mr. Ballard (R. 316). He attended

classes and believing "that they had something that would help people" suggested to the Ballards that they hold classes outside of Chicago, and in the East. (R. 318) He came back to Chicago and organized the first group meetings that were held. According to his testimony he had no thought of engaging in a book selling scheme but was interested in the dissemination of the teachings. (R. 315) Books were not mentioned with one exception until several months after he attended the meetings. The exception was that on one occasion the witness offered to sell the remaining copies of the first edition of "Unveiled Mysteries." (R. 317) It was this Government witness who seems then to have taken over all arrangements concerning the sale of books and the arrangement for classes outside of Chicago. (R. 322) It was he who suggested organizing permanent groups. (R. 323). Therefore, according to the Government's own witness, the spreading of this doctrine throughout the country resulted from a third person becoming interested in its dissemination to the extent of inducing the Ballards to leave Chicago and hold classes at other points with the understanding that he would take care of all arrangements. They seemed to feel their efforts should be directed to keeping the activity alive in Chicago. (R. 277)

The Government, from the indictment forward, has given an erroneous interpretation to the tenets of this religious activity. Referring to the twenty paragraphs of alleged misrepresentations, it is alleged in paragraph one that it had been represented that Guy W. Ballard had attained a supernatural state of immortality which enabled him to conquer disease, death, old age and misery; that he did, in fact, die on December 29, 1939. (R. 8)

In paragraph 6 it is alleged the defendants represented that they had attained a supernatural state of self-immortality by reason of which they were free from ailments and able to conquer disease, death, old age, poverty and misery. It is presumed the Government intended to charge that the defendants were going to live forever in their physical body, as indicated by the fact that they allege that Mr. Ballard

died. The record is wholly lacking in any evidence to the effect that defendants represented they would live forever in their present physical body; had attained a supernatural state of immortality or had supernatural power to conquer disease or anything else. In fact Mrs. Ballard made it very clear to students that neither she nor any other person should make any such claim. She stated:

> "* * *never let any of us for one second ever dare to think, say, feel or do anything that would try to make others feel or believe that we are the Power of Understanding which is helping to set the student free. The ONLY POWER in this Activity or any other that ever did anything good for anyone, is the Divine Activity of Life which is the 'Mighty I AM Presence' and no human being in this Activity shall ever take the credit in thought, feeling, word or act * * *." ("The Voice"—April, 1940, pp. 36-37, Exhibit 60.)

Defendants did teach that they were immortal in one sense in which that term is used and taught that "every individual has the Divine Flame of Life Within Him". ("Unveiled Mysteries," p. 17) They further believed in a law of re-embodiment which encompasses a re-birth of the spirit in human form until it has attained a certain perfection at which time ascension will occur. (Unvailed Mysteries," pp. 17-18) The doctrine of re-embodiment seems to be similar to the doctrine of reincarnation which is widely accepted and is an integral part of Theosophy. (Phelan's "New Handbook of All Denominations," p. 290.)

It was never represented that through defendants' supernatural power and immortal state old age could be overcome. It is believed and taught that the frailities of old age can be partially or wholly overcome by abiding by the teachings; and that discordant thoughts and feelings destroy the body and the mind. ("Magic Presence," pp. 20-21) By attaining sufficient perfection one 60 years of age can be as strong, firm and active as youth. ("The Voice," December, 1937, p. 16.) This is alleged as a fraudulent misrepresentation notwithstanding the people who believe in the Bible teach persons have lived to be nearly 1000 years

of age. (Genesis 5:5; Genesis 5:27.) Christ gave this prophecy:

> "* * * There be some standing here, which shall not taste of death till they see the Son of man coming in his kingdom." (Matthew 16: 28.)

The Government alleges the Ballards offered to transmit to others, for money, the supernatural state allegedly enjoyed as well as the attributes of agelessness; immunity from dicease, poverty, etc., but the record is wholly destitute of any substantiation of the charge.

In paragraphs 2, 3 and 4 it is alleged that defendants represented that Guy W. Ballard and defendant Edna W. Ballard and/or Donald Ballard had been selected as divine messengers through whom the words of the Ascended Messengers would be communicated. For one to claim revelation is not uncommon, as the Bible from beginning to end, readily indicates. (Amos 3:7; Jeremiah 1:5; Genesis 5:22; Genesis 6.) In fact revelation is the basis of many, although not all, Christian faiths. Some churches, for example, the Roman Catholic, claim direct lineal authority from Christ. Some, for example Lutheran, claim authority on the direction given by Jesus to preach the gospel as expressed in Mark 16:15-18. But direct revelation is the basis of authority for other religions, for example, Church of Jesus Christ of Latter-Day Saints, also known as Mormons.

With respect to the reason which Saint Germain had for the selection of the messengers, the government did not sustain the charge that it was represented that they were chosen by reason of high spiritual attainments. It must be remembered that the concept of re-embodiment fundamental in this belief and that a part of that concept is the belief that one may improve and reach a higher spiritual state in the course of previous embodiment. The Ballards taught that by reason of previous associations with Saint Germain and attainments during those embodiments. Mr.

Ballard was selected. ("Unveiled Mysteries," p. 15.) The Government, therefore misunderstood the teachings of the Activity when it charged the defendants with representing that they were selected for their high spiritual attainments during this lifetime. Donald Ballard was but a youth during the time covered by the charges. However, the Government did not even introduce evidence that by reason of lack of spiritual attainment or righteous conduct in this lifetime the Ballards could not have been so selected or could not believe that they were so selected.

In paragraph 5 it is alleged that the defendants represented that the precepts and doctrines promulgated by them of the I AM Movement are the only channels through which the teachings of Saint Germain and other Ascended Masters had been given to the world and that such teachings were absolutely essential to the salvation of mankind. The defendants never taught that only through the teachings of the I AM could mankind attain salvation. They taught that the teachings of the I AM Activity would furnish a means of eventual salvation. The Activity taught what every religion teaches: that an adherence to its teachings is a mean for final salvation. Some actually teach what the defendants were charged with—that their religion is the only means. It is interesting to note that Christianity maintains that only through its teaching can man be saved; (Mark 16:16), notwithstanding that fully two thirds of the religious people of the world profess other than the Christian faith. Virtually every instruction and admonition of the I AM Activity as to salvation finds its counterpart in those religions that the Government does not dare to attack.

It is alleged in paragraphs 10, 11 and 14 that the defendants published and sold literature and other articles which they represented to have been divinely inspired, the result of divine visitations or which would bestow upon the purchaser great blessings and rewards. Defendants did represent that the teachings and precepts of the I AM,

as set forth in the books and discourses, are the result of revelations received through the Ascended Masters. Lack of belief that the discourses were divine revelations was sought to be shown by charges that stenographic transcriptions of the discourses had been corrected and punctuated and that on occasions grammatical errors had been corrected. Certainly it would be unusual to suppose that such errors would not occur or that Mr. Ballard would not from time to time improperly express the words received.

The Government contends that the defendant's represented the experiences of Mr. Ballard in "Unveiled Mysteries" and "The Magic Presence" were experiences had by him in the physical body. No such representation was made and the books themselves clearly sustain the statement. Neither professes said experiences to have been in the every day physical body and discloses that they occurred in some form of ethereal body. During the trial the Government sought to convince the jury that Mr. Ballard could not have been pre ent at the places named at the time designated. In so contending the Government wholly misconstrues the language of the books and fails to comprehend what is meant by the defendants when they state that an experience is real and that the person or beings were actually present.

In the Foreword of "Unveiled Mysteries" it is stated: "This book is written in the embrace of the majestic, towering presence of Mount Shasta." The Government proved that Mr. Ballard was present at Mount Shasta when he wrote the book. (Exhibit 203.) The following is also found in the Foreword of that book:

> "To those who read this work, I wish to say that these experiences are as Real and True as mankind's existence on this earth today, and that they *all* occurred during August, September and October of 1930 *upon Mount Shasta*, California, U. S. A."

However, it is not claimed that the experiences enumerated in the book occurred in the physical body of Mr. Ballard. It is stated, on page 24, by Saint Germain:

> "* * * you are experiencing these activities in your finer body—but they are none the less—Real—because of that—for your physical body is only a garment which you—the Self-Conscious—thinking—and experiencing individual wear. * * * *"

Clearly by the word "real" is not meant physical, for during the experience his body reposed on the ground, (p. 19) and on page 27 it is stated that after the experiences

> "*As we came near my body* he instructed again."

The manner in which the next experience occurred is clearly stated at p. 33:

> "Instead of going forth from the body as in your recent experience, today we will use the Projected Consciousness. * * *"

It is thereupon explained that in this state one may be in two places at one time and be fully conscious "wherever his body may be." The experiences which follow occur in the "finer body." (p. 75) Turning to "The Magic Presence" the experiences which the Government claims could not have occurred as recited because Mr. Ballard was not physically at the places mentioned at the time the experiences occurred, an examination of this book in relation to the first book clearly demonstrates that while the experiences are denominated "real, true and eternal" it does not say and it is not intended to convey the idea that he was actually at the places at the times mentioned in his physical body, as the term is ordinarily used, any more than in the first book. The Foreword of the second book states:

> "The book contains the *second* group of experiences which I was privileged to have through the Love and assistance of the Beloved Ascended Master, Saint Germain."

On the first page reference is made to the ending of "Unveiled Mysteries" and it is then stated that the "Magic Presence" contains another group of experiences Mr. Ballard was privileged to have during those months of association with Saint Germain. In "The Magic Presence" it is also stated:

> "In 'The Magic Presence' my experiences were the results of applying the knowledge he had previously revealed." (Foreword, p. 11.)

The reference is obviously to the use of the Projected Consciousness mentioned above and more fully described at pp. 33-34 of "Unveiled Mysteries." In such Projected Consciousness it is not necessary that the physical body be present and one may have experiences in two or more places at the same time. ("Unveiled Mysteries," p. 33). The defendants never represented that Mr. Ballard took the trips or was at the places mentioned in the book in his physical body, as the term is ordinarily used. In a radio address reprinted in "The Voice," June, 1937, magazine, Exhibit 26, page 9, Mrs. Ballard stated that the experiences which the books record occurred at Mount Shasta and in Wyoming in 1930.

The books were never represented as necessary for salvation. It was taught that the students should read the books. Record songs and other articles which the Government alleges were represented to be necessary to salvation were not so represented. They are merely the equivalent of articles which various religions suggest as being adapted to the assistance of the brethern in the attainment of salvation. Prayer books, rosaries, blessed candles, Holy water, oils and pictures are recognized by many of the sects as being of assistance to the faithful in the practice of their respective religious concepts. The record songs, pictures, and so on, employed by the Movement were of like category. They were believed to be effective for contemplation and meditation. Records were said to be charged

with a healing quality but "healing" as used by the Activity and by the students was not restricted to nor did it necessarily refer to physical ailments. It had reference to the mental and spiritual side as well. The songs and records assisted students in their endeavor to call upon their I AM Presence in an effort to obtain harmony and perfection believed by the group to be so essential. The magazine "The Voice" is merely the organ of the group through which its activities are made known.

In paragraph 7 it is alleged that defendants represented that the Ballards had, by reason of supernatural attainments, power to heal persons of ailments and disease and power to cure persons of diseases normally classified as curable or incurable and had, in fact, cured hundreds of persons afflicted with diseases and ailments. It will be noted that the Government's charge is that the Ballards claim that they could heal. Actually the belief of the Activity in connection with healing is similar to that of certain other sects. The only claim made was that healing may be and had been accomplished through calls to the Mighty I AM Presence; that the most they or any student could do was to place such calls. (Exhibit 60—"The Voice", April, 1940, p. 36). It was for the members as well as the leaders to make such calls and it was taught that it was only through the activity of the member the desired end could be attained. (Exhibit 12, page 8, April, 1936, "The Voice"; Exhibit 20, page 7, December, 1936, "The Voice"). Proof that the Activity taught that healing is accomplished chiefly through the effort of the individual but can be and often is assisted through calls by other students and by the leaders is shown not only by the Discourses but by the testimony of the Government's own witnesses, testimony of the defendants' witnesses and statements of the defendants themselves. It was taught that upon applying the law the students had as much healing power as the messengers. (Exhibit 29, p. 15, "The Voice," September, 1937). The Ballards publicly announced that in some in-

stances assistance had been obtained before the leaders even received the letters asking that they also make a call on the student's behalf. (Tr. 406) There was no misunderstanding among the members. Mr. Rogers, a Government witness and a member of the Ballard staff for a considerable period of time, stated:

> "I never heard the Ballards, or either of them, say that they had the power to heal. * * * Essentially the whole idea was predicated upon the theory that one must call upon the Mighty I AM Presence to project on them the healing ray and make them well. I believed this and still do." (Tr. p. 392.)

Mrs. Bliss, a former leader of the Activity and a Government witness bitter against the Ballrads, stated:

> "It was my understanding the person seeking healing had to ask for it and then be receptive in his mental attitude. * * * They said you could apply this principle yourself."

Defendants' witnesses, members of the Movement, came from all parts of the country and testified they did not hear Mrs. Ballard or anyone say that Mrs. Ballard could heal. Their understanding regarding healing was as stated above. (Cahill, Tr. p. 954; Sewards, Tr. p. 958; Boerrigter, Tr. pp. 972-973; Kildah, Tr. p. 980; Magnuson, Tr. p. 987; Leona Carter, Tr. p. 992; Roy, Tr. p. 1001; Lovette, Tr. p. 1005; Gardiner, Tr. p. 1007; Hudson, Tr. p. 1011; Palmer, Tr. p. 1040; Elsa Chamberlain, Tr. p. 948; Zimmerman, Tr. p. 936.)

Under the theory on which the case was supposed to have been tried, whether or not assistance was actually rendered through calls by the messengers, is not involved. The Government's own witnesses proved that the Ballards were repeatedly advised that persons had been assisted as a result of the Movement and there is no evidence they did not believe the information received. Paton Crouse, a Government witness who had been with the Ballards for a con-

siderable period of time but who was exceedingly antagonistic toward them, stated:

> "I actually talked to many people who claimed to be healed, and I believed those people who told me that they had been healed and that they had been healed as a result of the Movement. In letters I heard a number of people say that they had been cured of what was generally regarded by medical people as incurable diseases. I did not believe the statements in the letters without reservation in some cases." (Tr. p. 579).

That witness was with the Ballards day in and day out for a period of years. Apparently the Ballards were also advised by group leaders of healings which occurred among the members. (Exhibit 207, Tr. p. 856).

The Government witness Paton B. Crouse testified that he had seen X-rays from which it appeared that ankylosis had disappeared but that he believed the X-rays were somewhat blurred. (R. p. 579) This witness, who had been dismissed from the Movement for highly improper conduct (R. 575) testified that he had heard Mrs. Ballard state (not "frequently state" as the Government claims in referring to his testimony) from the platform that they had cured people suffering from cancer and that he had never heard anyone express *verbally* in the presence of Mrs. Ballard that they were ever cured or healed of cancer. However, on cross examination, he testified as follows:

> "* * * In *letters* I heard a number of people say that they had been cured of what was generally regarded by medical people as incurable diseases." (R. 579)

Apparently the Government witness was quibbling over the manner in which the information was conveyed.

During the three and one-half years of constant contact and apparently until dismissed as aforesaid he believed in the sincerity of the Ballards. The Government states that two former followers testified that they had not observed healings accomplished at the call of the messengers. How-

ever, nine members of the Activity testified that they had been benefited and healed through it. Boerrigter—improved eyesight and better health (Tr. p. 973); Johns—acute nervous headaches (Tr. p. 995); Cahill—benefited physically (Tr. p. 954); Zimmerman—eyesight and general physical condition (Tr. p. 938); Buck—improvement of weakened condition (Tr. p. 989); Hawley (Tr. p. 997); Roy (Tr. p. 1002); Lovette—paralysis, diabetes, heart condition (Tr. p. 1003); Hudson (Tr. p. 1012).

The Ballards resorted to common medication, as stated by the Government, and never claimed that it might not be required on occasions for themselves or the members. In fact assistance by the medical profession was recognized as sometimes essential. (Exhibit 54, p. 35, "The Voice," October, 1939). That the Ballards resorted to common medication as stated by the Government is true, but what is not stated is *that the Ballards never made any claim that they did not do so.*

It is charged in paragraph 9 that the defendants falsely represented that the Ballards had divine and supernatural ability to bring forth from supernatural state money, riches and other material needs. This allegation was apparently based upon the fact the I AM belief contains a concept concerning precipitation, both natural and instantaneous. The Government apparently objects to this concept when promulgated by the I AM Activity, notwithstanding that almost every Christian belief contains a concept of natural precipitation through faith and prayer and recognizes the accomplishment of instantaneous precipitation in the works of Christ. Prayers for rain, peace, prosperity, health, etc. are obvious examples of a similar concept in another guise. Examples of instantaneous precipitation by numerous persons other than Christ are enumerated in the Bible. (Psalm 106:9-11; Exodus 17:5-17; I. Corinthians 12.) Precipitation as taught by the Activity did not contemplate the accomplishment thereof by the leaders any more than by the students. ("The Voice"—September, 1937, p. 14, Exhibit 29.) Members were taught that precipitation which they

could accomplish would probably be through natural means. (Exhibit 17, p. 11) However it was believed that by their efforts to reach perfection they were also making progress toward the accomplishment of instantaneous precipitation. ("The Voice"—March, 1939, p. 11, Exhibit 47). Once attained it would be possible for a person to precipitate anything proper for them to have. (Exhibit 5, "I AM Discourses," p. 64; "The Voice"—July, 1936, p. 10, Exhibit 15.)

Mrs. Ballard testified that as far as she knew Mr. Ballard had never attempted instantaneous precipitation. (Tr. 1148) and that she had not been able to accomplish it. (Tr. 1148) The Government refers to page 363 of the Transcript, in the testimony of Max Gysi in which he claims Mrs. Ballard told him the jewel or stone given to her during a meeting was precipitated. However it appears that it was Max Gysi, the Government witness, who claimed that precipitated stones existed and it was the Ballards who warned the students against such false claim. (R. 361) The Ballards warned members that in their opinion other similar claims were false. (Exhibit 40, p. 35 "The Voice"—August, 1938).

Furthermore the Government in its brief attempts to use this particular testimony to sustain its contention that the case does not involve spiritual matters but a reference to paragraph (9) of the representations (R. 13) will disclose that the representation set forth alleged to have been made was that she had divine and supernatural power to precipitate There is no allegation in the indictment that certain articles were precipitated articles which representation was false. *That question was not involved in the case.*

The Government relies upon evidence of the "Max Gysi" character to substantiate its claim that this is not a close case, and fails to point out that the members of the organization who testified stated that the doctrine taught by the Ballards was as above outlined and that such was their understanding of it. (R. 992, 996, 1001, 1006, 1008).

What was taught by this organization and what was believed in was for the most part contained in published articles by "The Voice" magazine. We cannot follow the claim of the Government that a strong case of proof that the Movement was a fraudulent scheme and not a bona fide religious activity has been established by bringing to court a few disgruntled followers of the Movement to testify that things were taught contrary to what the followers stated had been taught or the published teachings of the Movement disclosed; or to testify to matters which might cast doubt upon the good faith of the leaders. Apostates have been available from the commencement of the Christian religion and in the course of the formation of almost all of them ready to testify against the leader or leaders; ready to say that they taught that which they did not teach, or to misconstrue what was actually taught.

Nor does the Government establish its position in a case of this kind merely by showing that on occasions leaders of the Activity may have been over exuberant in seeking its expansion. Religious liberty has been held to include the right to (a) practice any religious principle not contrary to public morality; (b) organize religious associations for the expression and dissemination of those ideas (Watson v. Jones, 80 U. S. 679), and; (c) collect funds by the sale of religious books or tracts, or otherwise, for the maintenance and expansion of the religious organization formed. (Murdock v. Penn., 319 U. S. 105, at 111.) The protection of the free exercise of those rights has been considered so important that excesses and abuses, including a certain amount of exaggeration and false statement are permitted rather than to chance the abridgement of them. (Martin v. Struthers, 319 U. S. 141, 149; Cantwell v. Conn., 310 U. S. 295, 310.) The Court has gone so far as to assiduously protect the rights of one sect whose chief object seems to be the abuse and villification of a religion believed in by a great number of our people. (See Douglas v. Jeannette, 319 U. S. 157 at 171, also 167.) Opinion and belief are to be

allowed to develop unobstructed. (Cantwell v. Conn., supra.)

In paragraph 13 the Government alleges that defendants represented one Charles Sindelar had painted the picture of Saint Germain as the result of a visitation by Saint Germain before said Sindelar when in fact that defendants knew that the picture was a copy of a previously existing picture by Theresa de Carranza. In 1929, and before the Movement existed, Charles Sindelar had painted a picture of Jesus widely exhibited by Christian denominations which he claimed was the result of a visitation. (R. 1060). However the likeness of Saint Germain was painted by Charles Sindelar at the request of Mr. Ballard. (R. 1062) His first attempt was wholly unsuccessful and the Ballards and Mr. and Mrs. Sindelar sat down and called on the Mighty I AM Presence to give Mr Sindelar some idea of the appearance of Saint Germain. He thereby obtained a mental impression which was supplemented when necessary by further calls. (R. 1061-1062) The difference between the two pictures was constantly emphasized when they were offered to the members.[1]

The scroll placed behind the picture painted by Sindelar is the same as that appearing on the picture by Theresa de Carranza. Mr. Ballard directed that the same scroll be used. However Mr. Sindelar denied that he copied the picture previously used. (R. 1063) As he states: "It would be a very poor copy if I had." A comparison will disclose that one picture is not a copy of the other. (Exhibit AAA; Exhibit 201). The scroll has no significance, being a common one of Theosophical origin. (R. 1070)

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[1] As to the picture of Christ it was said:

"Jesus came to Mr. Sindelar for 21 consecutive days at two o'clock in the morning in his visible body until the painting was completed."

With reference to the picture of Saint Germain it was said:

"Saint Germain revealed himself to Mr. Sindelar previous to and while he was painting Saint Germain's likeness and He has said that it is splendid."

We feel the foregoing amply illustrates that the Government's statement of the evidence is inadequate and does not present to this court what was before the jury for its consideration. Thus, if we assume for the purpose of argument that the Government has found evidence of bad faith for the jury's consideration, certainly ample evidence of good faith was also before it. Therefore the Government has wholly failed to show that the judgment was not "substantially swayed" by the errors of which complaint is made. The Government has attempted to bring itself within the rule laid down in Kotteakos v. United States, supra, but has not done so.

The Government seeks to uphold the use of invectives in this case on the ground that they were used as a proper characterization of the petitioners or descriptive of the crime charged. There is apparently considerable difference of opinion among the Circuit Courts in this connection. We have cited a number of cases holding that under the rule that it is the duty of counsel to discuss the facts, denunciation has no place in the argument (Pet. Br. p. 26) and we believe they state the correct rule but in any event the cases cited by the Government do not in any wise support the claim that the denunciation *in this case* was proper. They can be readily differentiated. Here there was a studied and continual abuse and denunciation of the petitioners. They were called "cheats," "charlatans," "religious racketeers" (R. 1540, 1283), "adept prevaricators" (R. 1244), "glib prevaricators" (R. 1318), "the most successful fakers in the knowledge of the history of fakery" and their religion a "flim-flam scheme" and the "Ballard racket." (R. 1178) They were characterized as "cheats," "charlatans" and "religious racketeers" on one occasion not because of a claim that the evidence proved them to be such but, according to counsel, *because they could not make their religion work on themselves.* (R. 1540) The latter remark would not even be proper under the Government's contention that there is such a

thing as permissible denunciation. An examination of the cases cited by the Government discloses that in most of them the contention that there was misconduct related to isolated remarks.[1] We most certainly cannot agree that "much stronger denunciations of defendants have been upheld," citing *U. S.* v. *Wexler*, 79 F. (2d) 526, 530; *U. S.* v. *Holt*, 108 F. (2d) 365, 369.[2]

The Government claims that the prosecution was justified in taunting the petitioners for not proving divine healing by producing witnesses who had actually been cured on the theory that the statement was pertinent to the issue of good faith. Clearly this is not true for two reasons. Such proof would not be permissible under the court's instruction. They were under no more obligation, in view of this instruction, to produce witnesses who had been cured to save themselves from such taunts than to satisfy the prosecution's demand that they should have been told about and had an example of precipitation "shown us" in court. (R. 1303; Dissenting Opinion, R. 1644) Secondly, it was the Government who claimed that representations in connection with healing were untrue and it was for the

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[1] Thus in *Randle* v. *U. S.*, 113 F. (2d) 945, 950, *the sole complaint* was that in answer to a query by defendant's counsel Government counsel stated: "I intend to show that she (the defendant) is nothing but a fraud from beginning to end." In *Schmidtberger* v. *U. S.*, 129 F. (2d) 390, 392, a defendant who was charged with illegal sale of narcotics was characterized on *one occasion* as a peddler of narcotics, the Government having shown that he conveyed the narcotics from his office to a hotel for sale. In *Gray* v. *U. S.*, 14 F. (2d) 366, 367, a defendant charged with sale of alcoholics was characterized on *one occasion* as a bootlegger. Even here the court said "* * * This character of argument to a jury should be omitted"; and, further, that the argument should be directed to a presentation of the facts.

[2] In the *Holt* case the defendant, who was mayor of a city and charged with fraud, was on *one occasion* called "a despicable mayor." [p. 369.] In the *Wexler* case there were only two instances of denunciation. On one occasion it was stated that the defendant had spent his entire life cheating, robbing, assaulting and worse, and, on another, that he had never earned an honest penny in his life.

Government to prove the allegation if the subject was pertinent to this trial—not for the defendants to disprove it. The only evidence offered by the Government in this connection was to the effect that many persons had claimed to have been healed through belief in the tenets of the I AM. (R. 579)

A comparison of cases cited by petitioners (Pet. Br. p. 32) with those cited by the Government (Res. Br. p. 40) discloses that there is a sharp conflict with the Circuit Courts as to the propriety of urging a conviction on the ground that such conviction would serve as a warning to others. We submit that in view of the rule above mentioned that argument of counsel is for the purpose of discussing the facts, those cases holding such conduct improper state the correct rule; and that the court, in *Turk* v. *U. S.*, 20 F. (2d)129, at 131, correctly points out that it is as fatal to a fair trial that a jury's verdict is based upon a wrong and unlawful reason, as that it was caused by incompetent evidence.

In this connection, and in connection with the other instances of misconduct objected to, we ask that the court bear in mind it is not necessary to petitioners' contention that any single instance would justify a reversal of the judgment. It is the cumulative effect of the varying and serious improprieties—jeering at petitioners' belief, asking for proof of supernatural intervention, denouncing the petitioners generally and because they cannot prove their belief on themselves, demanding a conviction so that our soldiers will not have fought for naught, or because of a claim that poor people were defrauded, or as a warning to others, and the injection of allegedly personal knowledge of the prosecutor into his argument—which requires that the judgment be reversed. They were continued throughout the argument and at more than one session of the court.

According to the Government, the acquittal of some of the defendants proves that the arguments were not prej-

udicial and that the jury was able to distinguish between belief and veracity of tenets. This result of the trial has none of the effect the Government ascribes to it. There is no doubt that Mrs. Ballard was the leader of the I AM Movement. Quite naturally the Government, in its determination to break up the Movement wishes to convict the leader and has slight interest in persons of lessor importance. This is not a surmise. The record shows this to be a fact. The opening argument of counsel consists of 143 printed pages. For the most part it is a denunciation of Mrs. Ballard, others only being incidentally mentioned. After 117 pages counsel mentioned certain of the other defendants, devoting as little as a paragraph to some, a page or two to others. He did not summarize the case, he stated, as to Mrs. Ballard because she was "the entire case herself". Two of the defendants were "the advance salesmen of the Ballards, planting seeds and picking bones and taking the nibbles that came along. (laughter)" (R. 1300) After the brief summary as to other defendants (see R. 1299-1314) the prosecutor, near the end of his opening argument, stated:

> "Now, in conclusion, I first wish to state I will not go into any evidence relating to Edna W. Ballard. If she hasn't been guilty of a fraud in this case, then nobody has ever been guilty of fraud in any case. The entire subject matter revolves around her. Anything done by the other defendants had Edna W. Ballard's finger in it." (R. 1322-1323)

Now, after devoting their efforts to convicting the Ballards, the Government should not be permitted to use the acquittal of the other defendants to absolve it from actions of a prejudicial nature.

In the first trial, on a similar indictment, there was no decision against the Ballards. (Dissenting Opinion, R. 1653) We presume a permissible surmise would be that the different outcome resulted from the manner in which the second trial was conducted. We suggest the foregoing only

to illustrate the futility of attempting to speculate in the matter of prejudice as suggested by the Government.

The Government maintains that failure of counsel for defendants to object to the improper argument would justify a refusal to reverse the judgment on that ground. However in this connection it is the rule that litigation in the Federal Court, even private litigation, is a matter of public importance in which the state has an interest to see that the trial is fairly and impartially conducted. Such public interest requires the court, of its own motion, to protect suitors in their right to a verdict uninfluenced by appeals of counsel to passion and prejudice. *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310, 73 L. Ed. 706; *Pierce* v. *United States*, 86 Fed. (2d) 949; *Volkmor* v. *United States*, 13 Fed. (2d) 594; *Rouse* v. *Burnham*, 51 Fed. (2d) 709; *Kasson* v. *United States*, 87 Fed. (2d) 183; *London Guar. etc. Co.* v. *Woelfle*, 83 Fed. (2d) 325; *Chicago etc.* v. *Kelly*, 74 Fed. (2d) 31; *Aetna Life Ins. Co.* v. *Kelly*, 70 Fed. (2d) 589; *Union Elec. Light etc.* v. *Schneider Est.*, 65 Fed. (2d) 297.

In the last named case the Court states, at page 302:

> "The trial judge should be vigilant to protect suitors in their right to a verdict uninfluenced by improper remarks and appeals to passion and prejudice."

The Government cites the case of *United States* v. *Socony Vacuum Oil*, 310 U. S. 150, to the effect that defense counsel cannot remain silent and, after a verdict is returned, seize for the first time upon the point that comments to the jury were improper.

The record in this case does not sustain any contention of this nature. At the very outset of the address counsel for the prosecution clearly indicated the tenor of the argument with the following statement:

> "The Government claims in this case though, gentlemen, that this Ballard racket, as we might refer to it now in argument, is a flim flam scheme that has been

> unparalleled in history. These defendants here have been the most successful fakers in the knowledge of the history of fakery, and I think that is a tribute to the principal organizer, Edna W. Ballard. * * *"
> (R. 1178)

Counsel immediately objected. The court's ruling was a tacit approval of the type of argument being made, as was the additional statement that he had fixed the length of the argument so that the case could be thoroughly argued to the jury, and that remarks probably would be made which would not conform to the evidence but which he would depend upon the good sense of the jury to disregard. (R. 1179-1180) The stand taken by the court in connection with this objection of counsel undoubtedly demonstrated to them the futility of further objection and, what is more important, further objection to argument of the same nature by defense counsel under the circumstances would appear to the jury not only improper but impertinent, thereby prejudicing their case in the eyes of the jury.

As said in *London Guar. etc. Co.* v. *Woelfle*, 83 Fed. (2d) 325, at 339:

> "To interrupt the argument of opposing counsel is often a hazardous thing to do. It may create more prejudice than it removes, * * *. Jurors do not ordinarily know the difference between proper and improper argument. They easily obtain the impression that objecting counsel is unfair and is trying to keep them from hearing something of consequence. * * *"

The situation shows there was no attempt on the part of counsel to remain silent and thereafter take advantage of the error after the verdict. The Court should have interfered of its own motion. Instead, at the outset of the trial, it indicated that it did not intend to countenance objections to argument.

ARGUMENT.

II.

Defendants Are Entitled to a Dismissal of the Indictment By Reason of the Improper Selection of the Jury.

The Government does not deny that the grand and petit juries were improperly selected but predicates its argument upon the contention defendants' constitutional rights were not infringed upon and that thus no reason appears for the court to exercise its supervisory powers over the administration of justice in the absence of a showing of prejudice. We do not follow the contention that assuming defendants' constitutional right to a jury trial has not been infringed upon there would be no reason for this court to exercise supervisory powers. As pointed out in *McNabb* v. *United States*, 318 U. S. 332, this power is not limited to taking action to protect specific constitutional guarantees. Nor is the court limited as it is in cases arising in state courts to a determination whether or not there has been due process. In fact in the McNabb case no particular constitutional guarantee had been violated. Furthermore, if no constitutional guarantee is violated in this case none was violated in the Thiel case as we know of no specific guarantee that day laborers shall be included on jury panels any more than any such garantee as to women. Thus if the Government is right that no constitutional question is involved but the court finds that in the selection of the grand and petit jurors in this case there was a digression from acceptable standards as a result of which a large group was arbitrarily excluded from jury service, this court should act under its power to supervise the administration of justice just as it acted in the Thiel and McNabb cases. Any other conclusion would result in a perpetuation of an administrative denial of a right which law makers have not seen fit to withhold from defendants. *United States* v. *Roemig*, 52 Fed. Supp. 857, 862. The defendants in the case at bar were first indicted and tried

by juries drawn exclusively from the male population over their strenuous objection. (*U. S.* v. *Ballard*, 35 F. Supp. 105) Upon disagreement of the jury that indictment was dismissed and this indictment brought. Again these defendants strenuously objected to the exclusion of women but again to no avail. The Government suggests that this discrimination against women arose from a misapprehension as to what constituted a proper jury in the Federal Court.

May we suggest that the discrimination was a purely arbitrary practice directed by the court (R. 232-233) arising from a distaste for women jurors and that this practice was not altered until a shortage of male jurors available without undue burden being placed upon them occurred during the war. But in either case the trials illustrate the point that this court should and must continue its announced practice of requiring the impartial selection of juries. It should make clear that the arbitrary exclusion of women from the jury where they are qualified will result in the reversal of the verdict. Then the rights of defendants can no longer be withheld at the whim of any particular district.

We submit that in a case of this kind the inquiry should be simply whether a defendant has been indicted by a grand jury selected as he had the right under the law to expect it to be selected.

> "That inquiry answered negatively, the indictment ought to fail, without requiring the doubtfully possible proof of concrete injury to the moving defendant.
>
> "The government of the United States, by which the rights of its citizens under the law should be jealously guarded, cannot itself be allowed the optional privilege of lawlessness in bringing those citizens before the bar of justice. It must not violate the law which it promulgates for the preservation of its own existence and majesty and dignity; and then demand that its courts resolve in its favor a doubt whether its violation of the rights of the citizens has subjected

him to practical injury." (*United States* v. *Roemig*, 52 Fed. (2d) 285.)

There is another consideration upon which the Government does not touch. Aside from the matter of excluding classes distinguishable as a social, economic or political group, what percentage of the qualified jurors can be excluded without error? The Government wishes to sanction the exclusion of one-half of the community. Pursuing the argument to the ultimate conclusion that this is not error unless a defendant can prove he has been prejudiced the percentage which can be excluded appears to have no limit if those chosen are representative. Yet undue burden upon the citizens of the district is a recognized consideration in the matter of selecting jurors. (28 U. S. C. 413.)

While we do not feel it is important whether the question is solely a constitutional one or one calling for the exercise of this court's general power of supervision, we think the Government takes too narrow a view of what constitutes a constitutional question when it concludes that because women may be excused from jury service in 19 states, no constitutional question is involved here; also in its contention that because certiorari was not granted in cases arising in state courts no constitutional question arises here. As mentioned, in cases arising in the state court this court's power is limited to protection of a defendant's right under the Fourteenth Amendment. (*McNabb* v. *United States, supra.*) This court has held that in interpreting the provision for an impartial jury granted by the Constitution it will require the jury to be truly representative of the community, drawn from a cross-section thereof, not the representative of any group or class and selected without systematic and intentional exclusion of any group. (*Smith* v. *Texas*, 311 U. S. 128; 61 S. Ct. 64; *Glasser* v. *United States*, 315 U. S. 60, 62 S. Ct. 357; *Thiel* v. *Southern Pacific*, 66 S. Ct. Adv. Op. 984). If women constitute a special group or class substantial in number then by their

exclusion an impartial jury as thus defined would not result. The exclusion then becomes unconstitutional, not because women as such are excluded but because the jury has not been drawn in a manner which results in an impartial jury as thus defined. Thus as Mr. Justice Frankfurter points out in his dissenting opinion in the *Thiel* case in California a long list of persons who might be termed of the wage earning class are excluded by law by reason of competing considerations of public interest. But we have no doubt that in a state which did not recognize the necessity of their exemption this court would not hesitate to hold that an impartial jury had not been drawn where the clerk and jury commissioner arbitrarily excluded the groups mentioned and they were substantial in number. This serves to illustrate that the Government's contention that no constitutional question is involved merely because in some states women are not qualified is not correct.

We do not think that it is necessary to show that women are or do act as a class when sitting as jurors. If they constitute a special group or class, then this court should not permit their exclusion as it has stated that *tendencies* towards selection by a process which will not insure trial by a representative group will be sturdily resisted. (*Glasser* v. *United States*, 315 U. S. 16; 62 S. Ct. 457) This we take to indicate the court does not intend to await proof that the group excluded would have arrived at a different result than the group acting.

However we think that the claim that women do not constitute a particular class ignores common experience. Assuming it to be true that background, economic status and personality are the factors which tend to influence action, are those factors the same in respect to women as men? Is it not true that women's training differs from early childhood, their standards vary and interests differ widely from those of men? Clubs and organizations to which she belongs considered with their aims and interests and the innumerable magazines published solely for women's benefit testify to the fact that the personality and background of

a woman is not the same as that of a man. While the economic status of a woman may in some cases be closely connected with that of her husband, it certainly cannot be said that the economic status of women in general does not differ from the status of men. Accepting then the Government's definition of factors which constitute the mainspring of human action, we arrive at the same conclusion that women constitute a separate class having separate interests, different outlook and different responses to the same stimulae.

The Government's contention that receptivity to spiritual appeal has never been limited to one sex misses the point. The question is, is there any difference between the sex in matters concerning religion. As Judge Denman states in his dissenting opinion:

> "In the churches of all religions the numbers of women attendants on divine service vastly exceed men. The one large and vital religious group created in America since Joseph Smith is that of the Christian Scientists founded by a woman, Mary Baker Eddy." (R. 1651)

The statement is sustained by the statistics as to church members.[1]

We do not contend that it would be an abuse of discretion not to use women where proper facilities are lacking, or that much discretion does not exist in such matters. Where an exclusion is upon that basis it cannot be compared with an arbitrary exclusion. In this situation, as in any other, the action of a court acting within its discretion is not to be compared with its arbitrary action pursuant to a mistake as to the law. Innumerable cases turn upon this distinction.

We are not here interested in whether or not women in the nineteen states where they are excluded from jury ser-

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[1] Male members, according to the 1936 census of Religious Bodies, Vol. 1, pp. 86-87, published by the United States Department of Commerce, Bureau of Census, total approximately 20,000,000, while women members total approximately 25,000,000.

vice have a fair trial, nor does our contention that actual prejudice must be presumed require the conclusion that they do not. In those states she perhaps has no remedy for the resulting prejudice. In this case she does have by merely requiring that the rules laid down by this court in connection with the selection of juries be followed.

We do not agree the question no longer lacks practical significance. It should be determined whether the inclusion of women on Federal jury lists is a matter which defendants may require or is dependent upon the arbitrary action in the various districts. As the women in the remaining nineteen states are qualified under state law that question will arise there and it is important to determine whether women must then be used or whether, for a subsequent period of twenty-five years, as in the case in the Southern District of California, they may be arbitrarily and systematically excluded.

Defendants were indicted by an improperly selected grand jury and tried by an improperly selected petit jury. For that reason the indictment should be dismissed.

CONCLUSION.

In connection with the sufficiency of the indictment and the matter of the amendment to the indictment in the course of the trial we argued the matters fully in our opening brief (pp. 37 to 54). The brief of the Government, of course, sets forth its position on these points. It is our position that our brief fully and completely answers each and every contention made by the Government in its brief.

We submit that for the reasons stated in our briefs petitioners are entitled to a reversal of the judgment with directions to the trial court that the indictment against them be dismissed.

Respectfully submitted,

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